STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

* *

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 33-80

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, -V- CITY OF LIVINGSTON, MAYOR AND ALL AUTHORIZED REPRESENTATIVES OF THE CITY OF LIVINGSTON, Defendant.	ORDER

* *

In a Motion to Stay Proceedings Pending Determination of Arbitrability, Defendant brings to the attention of this Board the issue of whether the contract dispute in this matter is actually arbitrable.

The matter brought before the Board by Complainant, American Federation of State, County and Municipal Employees, is the question of whether a refusal to arbitrate is an unfair labor practice. That is, is the alleged contract violation in this matter an unfair labor practice?

In this motion, it appears that Defendant is attempting to appeal a possible adverse order before determination is made or before there is evidence to determine the very "facts" upon which the motion is based. Should this Board find in Complainant's favor and order the parties to arbitration, it would then be proper for Defendant to raise the issue of arbitrability in the arbitration forum itself. If the Board finds in Defendant's favor, the issue of arbitrability is moot.

Defendant's motion is denied.

Dated this 3rd day of June, 1981.

BOARD OF PERSONNEL APPEALS

BY: Linda Skaar
Linda Skaar
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was sent to the following on the 3rd day of June, 1981:

Donald C. Robinson
Poore, Roth, Robischon, & Robinson, P.C.
1341 Harrison Ave.
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Edmond Carroll, Mayor
City of Livingston
414 E. Callender
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Robert Jovick, Attorney
227 South 2nd
Livingston, MT 59407

George Hagerman
AFSCME
600 N. Cooke
Helena, MT 59601

Linda Shaar

PAD3:J

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF PARK

Filed this 9th day of July A. D. 1981 at 9:35 o'clock A m
EMMA BOWERS
Clerk of District Court
Park County, Montana
By _____ Deputy

THE CITY OF LIVINGSTON, a municipal corporation,

Plaintiff,

-vs-

No. 81-159

BOARD OF PERSONNEL APPEALS of the MONTANA STATE DEPARTMENT OF LABOR AND INDUSTRY, an agency of the State of Montana, and AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, a labor organization,

Defendants.

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BOARD OF PERSONNEL APPEALS

ORDER

The above-entitled matter came on for hearing on Monday, June 21, 1981, at 1:30 o'clock p.m., pursuant to a Temporary Restraining Order and Order to Show Cause heretofore issued by District Judge Jack D. Shanstrom.

The Plaintiff City of Livingston was represented by Donald C. Robinson, Esq., of Butte, Montana, and Robert L. Jovick, City Attorney, City of Livingston; James E. Gardner, Esq., of Helena, Montana, represented the Defendant Board of Personnel Appeals; George F. Hagerman, Field Representative, AFSCME, acting pro se, appeared on behalf of the Defendant American Federation of State, County & Municipal Employees.

Counsel for Defendant Board of Personnel Appeals entered herein a Motion for Substitution of Judge Jack D. Shanstrom, and the undersigned Judge assumed jurisdiction herein.

The Court having received certain documentary exhibits introduced by the Plaintiff, and having heard oral argument on the Plaintiff's motion to continue the Temporary Restraining Order in effect pending a determination on the merits, and further arguments having been had on the Motion to Dismiss

and Motion to Quash filed by the Defendant Board of Personnel Appeals, and the Court being fully advised in the premises, it is hereby

ORDERED, and this does order, that the parties submit legal memorandums in support of their respective positions, to be filed according to the following schedule:

1. Plaintiff's memorandum to be filed July 10, 1981;

2. The Defendants' memorandums to be filed by August 1, 1981;

3. Plaintiff's reply memorandum to be filed by August 7, 1981; and it is

FURTHER ORDERED, and this does order, that the Temporary Restraining Order heretofore entered herein be, and the same hereby is, continued in full force and effect, pending the submission of all briefs and until further order of this Court.

DATED this 6th day of June, 1981.

ORIGINAL SIGNED BY
Joseph L. Gary
District Judge

4DOC46/W

IN THE DISTRICT COURT

OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF PARK

* * * * * * * * * * * * * * * * *

ULP-33-1980

THE CITY OF LIVINGSTON, a municipal corporation, Plaintiff, -vs- BOARD OF PERSONNEL APPEALS of the MONTANA STATE DEPARTMENT OF LABOR AND INDUSTRY, an agency of the State of Montana, and AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, a labor organization, Defendants.	No. 81-159 FINDINGS OF FACT and CONCLUSIONS OF LAW and MEMORANDUM

This case was submitted to this Court on briefs by each of the attorneys for their respective parties. The Plaintiff, CITY OF LIVINGSTON, is represented by Donald C. Robinson of Butte and Defendant BOARD OF PERSONNEL APPEALS, is represented by James E. Gardner of Helena. The Court having examined the file in this matter, and from an examination of the records, the oral arguments presented, and from an examination of the briefs of the parties, and the law applicable, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That on July 1, 1979, the Plaintiff CITY OF LIVINGSTON entered into a labor agreement with Local No. 2711 of Montana State Council No. 9 of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

2. That the Union represents all employees of the City of Livingston Police Department, with the exception of the Chief and Assistant Chief.

3. That the collective bargaining agreement contains a

standard non-discrimination clause, viz: "The Employer agrees not to discriminate against any employee for his activity on behalf of, or membership in, the Union."

4. That the collective bargaining agreement provides that officers will be guaranteed a rotation of shifts every twenty (20) working days, but that there is no reference in the agreement regarding days or hours in which shifts will be scheduled.

5. That in the spring of 1980, the Chief of Police of the City made a reassignment of manpower on the Police force, creating a new shift for peak crime periods.

6. That certain employees were assigned to that shift.

7. That on May 10, 1980, the Union filed a grievance with the Chief of Police protesting his action.

8. That the Mayor of the City then took the position that creation of a new shift does not constitute a matter that is subject to the grievance and arbitration procedures of the contract.

9. That on August 14, 1980, the Defendant Union filed an unfair labor practice charge with the Board of Personnel Appeals charging the City with refusing to process a grievance through the contractually agreed upon grievance procedure, alleging that the City violated its duty to bargain in good faith as required by 39-31-401(5), MCA.

10. That on September 2, 1980, the City filed an Answer denying the charge.

11. That on April 16, 1981, the Board sent each party a Notice of Pre-Hearing Conference.

12. That on May 27, 1981, the City filed a Motion to Stay Proceedings pending a judicial determination of arbitration of the underlying dispute.

13. That the Board refused to stay proceedings and

issued an order denying the Motion.

14. That on June 11, 1981, the City obtained a Temporary Restraining Order and filed a complaint and petition for declaratory and injunctive relief.

CONCLUSIONS OF LAW

1. That the central issue of this case is: when a Union files an unfair labor practice charge with the Board of Personnel Appeals, must that administrative process be allowed to proceed to its final conclusion, or, should a District Court determination on the issue of arbitrability be allowed to take precedence.

2. That in view of the charge made by the Union, the administrative remedy should proceed prior to District Court review.

3. That the temporary restraining order issued by this Court is hereby quashed.

4. That AFCSME and the City of Livingston shall proceed with the pending administrative hearing in this matter.

DATED this 22nd day of December, 1983.

Joseph B. Gary
District Judge

MEMORANDUM

The problem in this case arises out of a conflict between the section of the statute dealing with management rights (39-31-303, MCA) and the section dealing with the duty to bargain regarding conditions of employment (39-31-305, MCA). The Plaintiff City wants the Court to determine whether the City must submit the contract dispute to arbitration. The City does not refute the claim that the Board hears and remedies unfair labor practices. It simply disagrees that its action was an unfair labor practice,

believing instead that the action was a management prerogative.

On the other hand, the Board argues that the hearing examinor should decide whether the City's refusal to arbitrate a grievance is an unfair labor practice. The Board insists that a District Court cannot accept jurisdiction for a declaratory judgment action when an administrative proceeding is already in process.

The procedure that the Plaintiff City proposes is a preliminary injunction pendente lite by the District Court pending resolution of the declaratory judgment action. The Court would then decide the issue in the declaratory judgment action--that is, whether the present issue is arbitrable. The Board could then proceed upon the conclusion of the declaratory judgment action. The City agrees that a Board hearing is acceptable, but only at the appropriate stage. For the Board to decide this issue now would mean the Board was undermining jurisdiction of the District Court to render a declaratory judgment on the issue of arbitrability.

The Board argues for a reversed procedure. First, the Board should rule on the matter of an unfair labor practice. This order could in turn be appealed to the District Court. The Board argues that a District Court ruling would be appropriate, but only on appeal after Board action. If the Court acted at this stage of the proceedings, it would be usurping the function of the administrative agency.

The question of whether the underlying issue -- the City's action in establishing a new shift -- is arbitrable or not is indeed an interesting question to this Court. However, that is not the issue before the Court. The single issue is who has the right to rule first in view of the Union's charge regarding an unfair labor practice -- the District Court or the Board of Personnel Appeals?

Case law indicates that one remedy the Union could have pursued would have been a suit to compel arbitration. Suits to compel arbitration were cited by the City, and include Butte Teachers' Union v. Board of Education, 173 Mont. 215, 567 P.2d 51 (1977), and Wibaux Education Ass'n. v. Wibaux County High School, 175 Mont. 331, 573 P.2d 1162 (1978). However, the Union chose a different avenue. It filed an unfair labor practice charge with the Board of Personnel Appeals. There is nothing which denies a Union this avenue to seek its remedy. Statutory law is very clear on this point. Section 39-31-401(5), MCA, states that it is an unfair labor practice for a public employer to:

> (5) refuse to bargain collectively in good faith with an exclusive representative.

Section 39-31-403 states the remedies for unfair labor practices.

> Violations of the provisions of 39-31-401. . . are unfair labor practices remediable by the Board pursuant to this part.

The statutes are also very clear on Court review and enforcement. Section 39-31-409 states:

> (1) The Board or the complaining party may petition for the enforcement of the order of the Board and for appropriate temporary relief or a restraining order and shall file in the District Court at its own expense the record and the proceedings.
>
> (2) Upon the filing of the Petition, the District Court shall have jurisdiction of the proceeding. Thereafter, the District Court shall set the matter for hearing and shall order the party charged to be served with notice of hearing at least twenty days before the date set for hearing.
>
> . . .
>
> (6) After the hearing, the District Court shall issue its order granting such temporary or permanent relief or a restraining order as it considers just and proper, enforcing as so modified or setting aside, in whole

> or in part, the order of the Board. Any order of the District Court shall be subject to review by the Supreme Court in accordance with rules of Civil Procedure.

The Court therefore agrees with the Defendant Board, that, in view of the action taken by the Union, a declaratory judgment action is improper and untimely since the established administrative remedies have been initiated but not yet exhausted The case of In the Matter of Dewar, 169 Mont. 437, 548 P.2d 149 (1976), is a case in point, with a variation in facts since the charge was pending before the Police Commission rather than the Board of Personnel Appeals. A question of law arose regarding certain authority of the Police Commission, and the advise of a District Court was sought by a Writ of Certiorari. The Court deemed declaratory judgment a more appropriate action, and made a ruling which was then appealed. On the issue of the propriety of a District Court rendering a declaratory judgment during the pendancy of the commission proceedings, the Montana Supreme Court held:

> (7) There is no Montana law on this particular situation because it is generally conceded in the law that this is not the office of a declaratory judgment. Declaratory judgment is a remedy that declares the rights and duties of the parties.
>
> (8) The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined. However, it is not the true purpose of the declaratory judgment to be provided a substitute for other regular actions. 22 An. Jur. 2d. Declaratory Judgment Sections 1, 2, and 6.
>
> Other jurisdictions have denied the remedy of declaratory judgment where appeal by statute or otherwise from the actions of administrative bodies exists. (cite)
>
> Similarly in Florida it is well established (cite) that the declaratory judgment statute: ". . .is no substitute for an established pro-

cedure for appeal or review of decisions of judicial tribunals, or of Boards or administrative officials exercising judicial or quasi-judicial powers."

No jurisdictions that could be found considered, much less approved the declaratory judgment as a vehicle to obtain relief from rulings within the jurisdiction of administrative bodies or commissions in the process of exercising their quasi-judicial functions and/or powers.

(9) The declaratory judgment in this matter was improperly issued and is hereby vacated and of no effect. Dewar, supra at 154.

The Plaintiff City did not present an altogether compelling argument against the exhaustion of administrative remedies doctrine. The City argued that:

> In the instant case, if the Union believed that the grievance was arbitable, and the City intended to the contrary, then the Union should have, and could have, brought suit to compel arbitration.
> Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, at 8.

The Court agrees with the City that the Union "could have" brought suit to compel arbitration, but does not agree that such action was the Union's only alternative. Since the Union chose to pursue an unfair labor practice charge, it would be inappropriate for the Court to rule on the arbitration issue while that charge is pending. Since the administrative machinery is already in gear, it should be concluded, at which time the Court has jurisdiction for review and enforcement.

Closely related to the issue of exhaustion of administrative remedies is the issue of the appropriateness of a declaratory judgment action. An applicable precedent is found in the case of Jeffries Coal Co. v. Industrial Accident Board, 126 Mont. 411, 252 P.2d 1046 (1952). In this case, the Coal Co. filed an action to enjoin enforcement of the Board's order to provide a washroom in accordance with a Montana Statute. The District Court ruled in favor of the Coal Co., but on appeal the

Montana Supreme Court ruled:

> It is well settled that the equity power of the Court may not be invoked by a litigant who has a plain, speedy and adequate remedy at law. (cite)
>
> The facts relied on by Plaintiff as the basis for the relief sought could be asserted as a defense to any proceedings brought by the Board to enforce compliance with its order.
>
> When matters relied on in the complaint in an injunction action constitute a defense to an action at law, it is held to constitute an adequate remedy at law precluding injunctive relief. (cites) Jeffries, supra at 1047.

The Coal Co. then moved for Rehearing, asking that the complaint be viewed as a declaratory judgment action. The Supreme Court denied the motion, stating that the Coal Co.'s grounds for challenging the Board's order could be raised in enforcement proceedings or proceedings questioning the validity of the statute.

Another applicable case is Intermountain Deaconess Home for Children v. Montana Department of Labor and Industry, Labor Standards Division, 623 P.2d 1384 (1981). In this case, the Division sent a Notice of Hearing informing the Home of a pending charge of back wages. The Home petitioned the District Court for a Temporary Restraining Order and Declaratory Judgment, requesting a determination of the applicable statute of limitations, arguing that the wage claims should be barred. The District Court accepted jurisdiction and ruled on the question. On appeal, the Supreme Court held that the District Court erred in granting the restraining order, and that the Department possessed only investigatory powers in the enforcement of minimum statutes. The Court said that the errors,

> . . .only complicated the administrative process of determining the validity of the claimant's wage claims and the inexpensive processing of these claims. Plaintiff requested and received a restraining order

> by alleging that the Department's action impaired its right to be free from the defense of stale wage claims. This alleged but unproven harm alone does not sufficiently threaten plaintiff's individual rights to justify Court-ordered restraint of the Department. The statute of limitations defense could be inexpensively and easily asserted at the Department's administrative hearing. (cite) Intermountain, supra at 1387.

In summary, the doctrine of exhaustion of administrative remedies, and the impropriety of a declaratory judgment action during administrative proceedings, argue strongly against this Court accepting jurisdiction of the arbitrability issue at the time.

Both the Plaintiff City and the Defendant Board bolster their arguments on the basis of judicial efficiency. (A contention sorely miscalculated in this case.) The Court finds equal merit on both sides. While it is true that a District Court decision on the arbitrability question may eliminate the need for Board action, the reverse is also true. An administrative hearing on the issue may well eliminate the need for an appeal to the District Court. In any case, the point of this decision is that administrative machinery has been established by statute to resolve the very question raised in this case. Unfair labor practices are remediable by the Board of Personnel Appeals. It is the Board who determines whether the charge has merit. Thereafter, the District Court has jurisdiction.

The Plaintiff City cited several cases illustrating its argument that the Court can order arbitration, and most probably decide the enforceability of an agreement to arbitrate an issue arising under a collective bargaining agreement. (See Butte Teachers' Union v. Board of Education, 173 Mont. 215, 567 P.2d 51 (1977), and Wibaux Education Ass'n. v. Wibaux County High School, 175 Mont. 331, 573 P.2d 1162 (1978). Butte Teachers involved a suit to compel arbitration. The District Court ordered

arbitration and the Supreme Court agreed. While this case illustrates the Plaintiff City's argument, it fails to refute the Defendant Board's argument -- that the Union still has the option of going the route of an unfair labor practice charge through the Board. Similarly in Wibaux, the education association sued to compel arbitration by the school board; the District Court denied the complaint, and the Supreme Court held that in the circumstances the school board's action was not a "grievance" under the contract and was thus not subject to binding arbitration, and arbitration of the issue was not allowed by the laws then in effect. Again, the case is distinguished from the present action since the association sued to compel arbitration.

The Plaintiff City accuses the Union of having "conjured up a grievance for the purpose of overriding a policy with which the Union does not agree." Plaintiff's Memorandum, supra at 8. Even if such a claim was valid it would nevertheless be no justification for the Court to pluck an issue out of an ongoing administrative proceedings. The Board is fully equipped to resolve the issue. It appears to this Court that the allegedly aggrieved Union had two (2) options. It could sue to enforce arbitration, in a District Court or file an unfair labor practice charge before the Board of Personnel Appeals. Each approach would have its own advantages and its own risks. But since the Union took the grievance route, that route must be brought to its conclusion before this Court has a role.

In conclusion, it is almost axiomatic and hornbook law that administrative procedures should be exhausted before recourse to the Courts except under very limited circumstances. In support of this view, this decision follows this basic fundamental law to exhaust the administrative remedies and the following that a recourse can be had to the Courts if necessary.

////

Therefore, the petition by the Plaintiff is denied, and the appropriate forum is held to be the Board of Personnel Appeals.

DATED this 22nd day of December, 1983.

Joseph B. Gary
District Judge

cc: Robert Jovick, Esq.
Mr. George Hagerman
Poore, Roth, Robischon & Robinson

Civil
81-159
21st February 84
Montana
By Jerry Darragh

CITY OF LIVINGSTON

Livingston, Montana 59047

Office Of:
CITY ATTORNEY

June 18, 1984

RECEIVED
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BOARD OF PERSONNEL APPEALS

and

AFSCME, AFL-CIO
Mr. George Hagerman
P.O. Box 5356
Helena, Montana 59604

The State Board of Personnel Appeals
Ms. Linda Skarr
35 Last Chance Gulch
Helena, Montana 59601

RE: Unfair Labor Practice Charge No. 33-80

Dear Ms. Skarr:

The undersigned have discussed and resolved in general that any questions of arbitrability of disputes can appropriately be raised to the arbiter and then, if appropriate, to the State District Court. Thus, the involvement of the State Board of Personnel Appeals would be inappropriate.

In any event, we believe that we have resolved any outstanding differences that would require a continuation of the above-described unfair labor practice charge and would jointly request that it be dismissed.

George Hagerman
GEORGE HAGERMAN

Robt L. Jovick
ROBERT L. JOVICK
CITY ATTORNEY